

the Channel Swap is ultimately approved (either by the Commission or a Court of Appeals), the Commercial Competitors will have the opportunity to relitigate the Channel Swap's merits through appeals of the various Collateral Proceedings. That the Commercial Competitors will seize upon that opportunity there can be no doubt.

Indeed, the Commercial Competitors are the only parties who are not prejudiced by the Staff's denial of the Consolidation Motion. The Staff is prejudiced because it must now resolve five proceedings in addition to the Channel Swap, including subsequent appeals. Commission resources will be wasted because in each proceeding the Staff must again review the merits of the Channel Swap. SCC and the University are prejudiced because ongoing litigation about the Cheyenne Mountain Permit and the University's translators could preclude full and timely implementation of the Channel Swap. The ultimate beneficiaries of the Channel Swap -- the citizens of Colorado -- also will be prejudiced because a delay in the Channel Swap's implementation means a delay in new noncommercial educational television service. It is, therefore, "difficult to see how the proper dispatch of the Commission's business and the ends of justice could be better served by [six] proceedings than by one."^{58/}

V. Conclusion

The Channel Swap is a far simpler case than the Staff Decision makes it appear. The Channel Swap meets and exceeds the Commission's channel exchange requirements. The University and SCC have demonstrated again and again that the Cheyenne Mountain Permit is properly included in the Channel Swap. The FCC's rules and precedent specifically allow this inclusion, and the Staff cites not a single legal or public interest reason for its contrary result.

^{58/} See KTIV Television Co., 2 RR 2d 95, 98 (1964).

The Staff Decision contravenes Commission precedent and raises serious First Amendment concerns.

The University and SCC have demonstrated the Channel Swap's substantial public interest benefits time and again. The Commercial Competitors, with their transparently anticompetitive motivations, have failed to demonstrate otherwise.^{59/} The Staff's disregard of the Channel Swap's public interest benefits is inexcusable and requires Commission reversal.

Finally, the Staff erred by not considering the Collateral Proceedings in conjunction with the Channel Swap. For almost a year prior to the Channel Swap Notice, the Commercial Competitors exploited the Commission's processes to launch their own private assaults on the Channel Swap. Their Collateral Proceeding pleadings repeatedly recite the history of the Channel Swap and their Comments and Reply Comments in this rulemaking dwell on the interrelationship between the Collateral Proceedings and the Channel Swap. Yet, for some unknown reason, the Staff turned a blind eye to these basic facts, thus prejudicing the ultimate outcome of the Channel Swap.

^{59/} See Amendment to the Television Table of Assignments to Change Noncommercial Educational Reservations, Notice of Proposed Rulemaking, FCC 85-73 50 Fed. Reg. 10817, 10818 (Mar. 18, 1985) (the Commission will not find a proposal lacking the requisite public interest benefits because "some other person could have entered into a better agreement, or because the proposal could increase competition in a given market").

Having failed to articulate any legal or factual basis for denying the Channel Swap, the Staff Decision must be reversed and the Channel Swap granted as proposed by the University and SCC in accordance with established FCC rules, precedent and policy.

Respectfully submitted,

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August 14, 1995

**APPENDIX TO JOINT APPLICATION FOR
REVIEW OF THE UNIVERSITY OF SOUTHERN COLORADO
AND SANGRE DE CRISTO COMMUNICATIONS, INC.**

MM Docket No. 93-191

Exhibit

Tab

<u>In the Matter of Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations, (Pueblo, Colorado), MM Docket No. 93-191 (July 14, 1995)</u>	<u>A</u>
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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-191

In the Matter of

Amendment of Section 73.606(b). RM-8088
Table of Allotments.
TV Broadcast Stations.
(Pueblo, Colorado)

REPORT AND ORDER

Adopted: June 30, 1995;

Released: July 14, 1995

By the Chief, Allocations Branch:

1. The Commission has before it a *Notice of Proposed Rule Making* ("Notice")¹ issued in response to a petition filed jointly by the University of Southern Colorado ("USC"), licensee of noncommercial television Station KTSC(TV), Channel *8, Pueblo, Colorado, and Sangre De Cristo Communications, Inc. ("SCC"), licensee of commercial television Station KOAA-TV, Channel 5, Pueblo, Colorado (jointly, "petitioners"). The *Notice* proposes an exchange of television channel assignments between Station KTSC(TV) and Station KOAA-TV pursuant to Section 1.420(h) of the Commission's Rules, 47 C.F.R. § 1.420(h). Under this proposal, the Television Table of Allotments, 47 C.F.R. § 73.606(b), would be amended as follows:

City	Present	Channel No.	Proposed
Pueblo, Colorado	5, *8, 26+, 32-		*5, 8, 26+, 32-

Thus, under the proposal, Channel 5 would be reserved for noncommercial educational use, and Channel *8 would be reserved.

2. Petitioners filed comments in response to the *Notice*, as did KKTV, Inc. ("KKTV"), licensee of commercial television Station KKTV(TV), Colorado Springs, Colorado, and Pikes Peak Broadcasting Company ("Pikes Peak"), licensee

of commercial television Station KRDO-TV, Colorado Springs, Colorado, and commercial television Station KJCT-TV, Grand Junction, Colorado. Central Wyoming College ("CWC"), an applicant for a new noncommercial television station to operate on Channel *8 at Laramie, Wyoming,² also filed comments *ex parte*.³ Petitioners, KKTV, and Pikes Peak filed reply comments.⁴

3. In addition, prior to the submission of comments in this proceeding, petitioners filed a Joint Motion to Consolidate Proceedings, requesting that a number of their pending application proceedings be consolidated with the instant rule making proceeding. KKTV and Pikes Peak filed oppositions to this motion, and petitioners filed a reply. These pleadings are currently before the Commission.

THE NOTICE

4. We found in the *Notice* that petitioners' proposal appeared to meet the Commission's requirements for channel exchanges between a noncommercial educational television station and a commercial television station,⁵ but we also expressed concern with respect to several matters. First, we observed that USC held a construction permit to modify Station KTSC(TV)'s facilities by relocating its main transmitter from its present site at Baculite Mesa to a site at Cheyenne Mountain, and that SCC wished to operate Station KOAA-TV from the construction permit site rather than from USC's licensed site. However, the Cheyenne Mountain construction permit site is short spaced to Station KJCT(TV), Channel 8, Grand Junction, Colorado, and to vacant Channel 8 at Laramie, Wyoming.⁶ Although USC had been granted a waiver of the minimum distance separation requirements of Section 73.610(b) in order to construct facilities for its noncommercial station at the Cheyenne Mountain site, we stated in the *Notice* that it would not be appropriate to decide at the allotment rule making stage whether such a waiver request by a commercial licensee would be granted.⁷ We therefore did not propose to modify SCC's authorization for Station KOAA-TV to specify the Cheyenne Mountain construction permit site, as SCC desired, but instead proposed to modify Station KOAA-TV's authorization to specify Station KTSC(TV)'s licensed site at Baculite Mesa.⁸

5. Second, USC had previously stated, in connection with its application to modify Station KTSC(TV)'s transmitter site, that it needed to move to the short-spaced site at Cheyenne Mountain in order to provide noncommercial educational television service to Colorado Springs without relying on a translator.⁹ Now, however, petitioners propose

¹ 8 FCC Rcd 4752 (1993).

² File No. BPET-921210KE.

³ CWC's comments did not include a certificate indicating that a copy had been served on petitioners' counsel. Nonetheless, in the interest of assembling a complete record, we have considered these comments.

⁴ Petitioners have also submitted a number of letters from community leaders supporting the proposed channel exchange.

⁵ As we noted, both stations operate within the same band and serve the same community of license. USC has stated that it would use the proceeds from the exchange solely to improve the service of Station KTSC(TV), and a public benefit could be obtained through the exchange. *Notice*, 8 FCC Rcd at 4753. See also 47 C.F.R. § 1.420(h); *Amendments to the Television Table of Assignments to Change Noncommercial Educational Reserva-*

tions, 59 RR 2d 1455 (1986), *recon. denied*, 3 FCC Rcd 2517 (1988) ("*Intraband Television Channel Exchanges*").

⁶ As already noted, CWC has filed an application for a new noncommercial educational station on Channel *8 at Laramie. See *supra* note 2.

⁷ *Notice*, 8 FCC Rcd at 4753 n.5.

⁸ *Id.* at 4753.

⁹ USC at one time used a translator station on Channel 53 to provide service to Colorado Springs, but in 1990 was required to cease operation on that channel due to the initiation of operations by a full power station. USC now operates translator Station K15BX to serve Colorado Springs. USC's operation of Station K15BX is effected pursuant to special temporary authority ("STA").

that USC operate from Station KOAA-TV's licensed site, which is, like the present licensed site of Station KTSC(TV), located at Baculite Mesa. Noting that, according to petitioners' engineering exhibit, shadowing occurs in Colorado Springs from this site, thus necessitating the use of a translator to provide service to that city, we observed in the *Notice*: "[W]e do not believe it is generally desirable to replace primary service to that community, as contemplated in connection with USC's waiver request, with a secondary service which could ultimately be forfeited to a full service television operation. . . ."¹⁰ We further stated that we would question the public interest benefits of the channel exchange proposal if USC planned to discontinue service to Colorado Springs.¹¹

6. Third, most of the potential gain in noncommercial reception service represented in petitioners' proposal would depend on the use of translators. According to petitioners, the proposed channel exchange would enable Station KTSC(TV) to provide new noncommercial reception service to 299,897 persons. However, this number includes 211,633 persons who would receive their first educational service as a result of USC's use of SCC's translator Station K30AA, which SCC would donate to USC as a condition of the channel exchange. In addition, 82,871 persons would receive Station KTSC(TV) as their first over-the-air educational service only through translator stations at Grand Junction and Durango, which, petitioners have stated, USC plans to construct using funds contributed to it by SCC in the channel exchange.¹² Because it is the Commission's policy to treat translators as secondary services for purposes of spectrum priority, USC's projected translator expansion would not be protected from the operation of a full service station. For this reason, we stated in the *Notice* that USC's projected population gains related to its proposed operation of translator stations at Colorado Springs, Grand Junction, and Durango might be too speculative to be considered in the context of this rule making proceeding and that we may not consider such gains as part of the overall benefits of the proposal.¹³

JOINT MOTION TO CONSOLIDATE PROCEEDINGS

7. Before considering the channel exchange proposal at issue here, we must address petitioners' Joint Motion to Consolidate Proceedings. The application proceedings petitioners wish to have consolidated with the instant channel exchange rule making proceeding involve (1) SCC's application for reinstatement of its construction permit for television translator Station K15BX, Colorado Springs;¹⁴ (2) SCC's application for an extension of time to construct Station K15BX;¹⁵ (3) SCC's application for an extension of its STA to rebroadcast Station KTSC(TV) on translator Station K15BX; (4) USC's application for an extension of

time to construct modified facilities at Cheyenne Mountain;¹⁶ (5) petitioners' application to assign the Cheyenne Mountain construction permit to SCC;¹⁷ and (6) four applications for new UHF translator stations filed by USC.¹⁸ According to petitioners, all of the pleadings filed in connection with these applications involve the same facts and issues and are ultimately related to the public interest merits of the proposed channel exchange. For these reasons, they argue, there is no need for the Commission to issue multiple decisions.¹⁹ Petitioners also assert that the pleadings filed by KKTV and Pikes Peak against these applications have been submitted for the purpose of delaying a decision on the merits of the channel exchange, and that justice requires that this delay be avoided through consolidation.²⁰

8. KKTV and Pikes Peak oppose petitioners' motion to consolidate on the grounds that the various application proceedings included in the motion are unrelated or only marginally relevant to the rule making proceeding, and that consolidation would add issues needlessly to the rule making proceeding and delay a decision.²¹ KKTV further states that, if the Commission consolidated the proceedings, it would have to permit interested parties additional time to file comments and reply comments with respect to the additional issues in the consolidated proceeding or deny parties the right to comment on the consolidated proceeding.²² In reply, petitioners point to several facts that they claim demonstrate the connection between the application proceedings and the channel exchange proposal: (1) KKTV and Pikes Peak expressed no opposition to Station KTSC(TV)'s Cheyenne Mountain construction permit or SCC's construction permit for translator Station K15BX until the channel exchange was proposed; (2) KKTV and Pikes Peak devoted substantial portions of their comments in the instant rule making proceeding to discussions of these construction permits; and (3) the *Notice* in this proceeding referenced the pendency of the Cheyenne Mountain construction permit extension request and the Station K15BX STA.²³ Petitioners also assert in their reply that consolidation would not result in delaying the rule making proceeding and would not necessitate the submission of further comments because all issues have already been fully briefed.²⁴

9. We are not persuaded that the consolidation of proceedings requested by petitioners would be appropriate. Petitioners have not demonstrated, as they claim, that the proceedings included in their motion involve the same facts and issues, and we find that the application proceedings they have included are either unrelated to their channel exchange proposal or involve primarily legal issues and/or factual questions that fall outside the scope of this proceeding. Moreover, contrary to petitioners' assertions,

¹⁰ *Notice*, 8 FCC Rcd at 4753.

¹¹ *Id.*

¹² See *infra* note 18 and para. 13.

¹³ *Notice*, 8 FCC Rcd at 4754.

¹⁴ File No. BMPTT-911105JE.

¹⁵ File No. BMPTT-921002JE.

¹⁶ File No. BPET-930216KE.

¹⁷ File No. BAPET-930902KE.

¹⁸ These applications are for UHF translator stations at Grand Junction, Colorado (File No. BPTT-930330CC); Cortez-Red Mesa, Colorado (File No. BPTT-930330CA); Durango, Colorado (File No. BPTT-930330CB); and Ignacio, Colorado (File No.

BPTT-930330CD).

¹⁹ Joint Motion to Consolidate Proceedings at 3.

²⁰ *Id.* at 5.

²¹ Opposition of KKTV, Inc. to Joint Motion to Consolidate Proceedings at 2-6; Pikes Peak Opposition to Joint Motion to Consolidate Proceedings at 2-5.

²² Opposition of KKTV, Inc. to Joint Motion to Consolidate Proceedings at 5.

²³ Joint Reply to Oppositions to Joint Motion to Consolidate Proceedings at 3-5.

²⁴ *Id.* at 6.

the issues raised by the application proceedings are not germane to our public interest analysis of the instant channel exchange proposal.

10. SCC's applications having to do with translator Station K15BX are unrelated to this proceeding. SCC obtained the construction permit for this station in 1987, well before it sought to exchange channels with USC, in anticipation of the possible displacement of its translator Station K30AA. The fact that USC operates this station pursuant to an STA does not, by itself, mean that SCC's applications to reinstate and extend the construction permit for Station K15BX, and to extend the STA under which it is operated, should be considered in conjunction with this rule making proceeding. SCC has not shown that there is any connection between Station K15BX and the proposed channel swap, or any of its potential public interest benefits, and our mention in the *Notice* of Station K15BX in our description of the current circumstances of Station KTSC(TV)'s operation does not establish such a link.

11. Turning to USC's application for an extension of time to construct at Cheyenne Mountain, we note that USC applied for its construction permit to relocate its main transmitter to a site on Cheyenne Mountain prior to requesting the channel exchange with SCC, stating that it needed to make this modification in order to provide noncommercial educational television service to Colorado Springs without relying on a translator station. In its comments in this proceeding, USC has affirmed that it remains interested in relocating its transmitter to the Cheyenne Mountain site if the channel exchange with SCC is not approved.²⁵ The fact that USC and SCC now wish to include the Cheyenne Mountain construction permit in their proposed exchange so that SCC may relocate to that site does not warrant consolidating USC's extension request with this proceeding. Although, as we have stated, USC's involvement in this rule making proceeding may provide a basis for extending Station KTSC(TV)'s construction permit, the issue of whether or not USC has satisfied the requirements of Section 73.3534 of the Commission's Rules for obtaining an extension of the permit also involves other questions unrelated to this proceeding. Moreover, as we indicated in the *Notice*, it would not be appropriate for us to decide, in the context of a rule making proceeding to amend the TV Table of Allotments, whether a construction permit that includes a waiver of the minimum spacing rules should be transferred from a noncommercial station to a commercial station. Thus, whether or not USC obtains an extension of the Cheyenne Mountain construction permit, the permit may not be included in the channel exchange and would not affect the public interest analysis of any channel exchange proposal we would approve.

12. Petitioners' application for FCC consent to the assignment of the Cheyenne Mountain construction permit from USC to SCC should also be examined independently of the instant proceeding. We do not agree with petitioners' assertions that the issues involved in deciding whether

SCC should receive this permit are identical to the issues that were involved in granting the permit to USC.²⁶ The Cheyenne Mountain construction permit, including its minimum spacing waiver, was granted to USC largely on the basis of USC's need to provide television service to the area that it is responsible for serving through its educational programs. This factual basis for our grant to USC would not, of course, apply to SCC. Moreover, there is now an application pending for a new station on Channel *8 at Laramie, Wyoming, a circumstance which did not exist when we granted the construction permit to USC. In addition, as we discuss more fully below, it would be contrary to well-established Commission policy to grant a minimum spacing waiver at the allotment stage. We therefore conclude that petitioners' assignment application should be examined on its merits separately from the instant rule making proceeding.

13. USC's applications for new translator stations should also be considered separately from this proceeding. As we indicated in the *Notice*, we may not consider any speculative gains in coverage attributable to translators in our public interest analysis of the channel swap proposal.²⁷ Moreover, we note that, although petitioners state in their joint comments and reply comments in the channel exchange proceeding that USC will use funds contributed by SCC to construct these translators, USC has gone forward with its translator applications independently of this proceeding, certifying to its financial ability to construct and operate the stations and apparently intending to do so whether or not the channel exchange with SCC is approved.²⁸ Thus, there is no factual or legal reason for consolidating the translator applications with this proceeding.

14. In light of the factors discussed above, we will deny petitioners' Joint Motion to Consolidate Proceedings and, in keeping with this decision, we will not consider herein the various arguments presented by the commenters in this proceeding regarding the merits of USC's request to extend the Cheyenne Mountain construction permit. Although we touched briefly on this issue in the *Notice*, we now find that it falls outside the scope of this proceeding.

CHANNEL EXCHANGE PROPOSAL

15. *Comments.* Turning to the channel exchange proposal itself, we first consider petitioners' contention that the Cheyenne Mountain construction permit must be included in the exchange. In their joint comments filed in response to the *Notice*, petitioners assert that our exclusion of the Cheyenne Mountain permit from our channel exchange proposal is unwarranted and contrary to law on a number of grounds.²⁹ Thus, petitioners note that, when the Commission adopted Section 1.420(h) of its rules, it specifically provided that permittees could be parties to channel exchanges, and they argue that it necessarily follows from this that permits for unbuilt modifications must be transferred in connection with channel exchanges.³⁰ Peti-

²⁵ Joint Reply Comments at 28-29.

²⁶ In their Joint Motion to Consolidate Proceedings, petitioners argue generally that all of the proceedings they wish to have consolidated involve the same issues, without specifically explaining how this might be the case. In their comments in response to the *Notice*, they contend specifically that the issues that would be involved in considering a grant of the permit to

SCC would be those that were involved in considering the grant to USC. See *infra* para 16.

²⁷ *Notice*, 8 FCC Rcd at 4754.

²⁸ See *supra* note 18.

²⁹ Joint Comments at 3-9; Joint Reply Comments at 10-14.

³⁰ Joint Comments at 4-6.

tioners further assert that the Commission has routinely approved channel exchanges involving outstanding construction permits for unbuilt stations, that no previous approvals of channel exchanges involving authorizations for unbuilt facilities have depended on prior implementation of the permits,³¹ and that the transmitter relocation sought by SCC is no different from other such relocations obtained by commercial licensees in channel swaps approved by the Commission.³²

16. Petitioners also argue in their comments that inclusion of the Cheyenne Mountain construction permit is the only "sensible result" here because, if the permit is excluded, the parties to the exchange will have to file an application for consent to assign the permit to SCC, or SCC will have to file a modification application to relocate to Cheyenne Mountain.³³ In either case, petitioners claim, the Commission will be required to address issues it has already considered in granting the permit to USC. According to petitioners, the Commission has already decided that operation of a television station on Channel 8 from Cheyenne Mountain is in the public interest, and the short-spacing waiver granted to USC should not be reevaluated to determine whether SCC may also make use of the waiver.³⁴ Indeed, according to petitioners, the Commission, having made a determination that the waiver for USC was in the public interest, is bound under the doctrine of *res judicata* to grant the same waiver to SCC. Petitioners further argue that Section 73.610 is a technical rule and that, under well-established Commission policy, waivers of technical rules should not be based on nontechnical considerations. To base such a waiver on the commercial or noncommercial status of a station would, they contend, be contrary to the First Amendment, Section 326 of the Communications Act of 1934, as amended, and judicial precedent.³⁵ Based on these arguments, petitioners assert that the fact that the Cheyenne Mountain permit contains a short-spacing waiver is not an impediment to inclusion of the permit in the channel exchange.

17. Finally, petitioners state that SCC's continued interest in the channel exchange at issue here is conditioned upon inclusion of the Cheyenne Mountain construction permit.³⁶

18. In its comments, KKTv states that our decision in the *Notice* not to include the Cheyenne Mountain construction permit in our channel exchange proposal was correct. According to KKTv, the construction permit for Cheyenne Mountain should be extended only for the use of USC or not extended at all, and USC should not be allowed to abandon the commitment it made to provide primary service to Colorado Springs by now turning over the Cheyenne Mountain construction permit to SCC.³⁷

KKTv argues that the cases cited by petitioners as precedent for inclusion of the Cheyenne Mountain permit are inapposite here, stating in particular that the channel exchange approved in *Gary, Indiana*, did not result in a commercial station acquiring a short-spaced site that had been granted to a noncommercial station.³⁸ KKTv also asserts that the minimum spacing waiver granted to USC was based on unique facts, that entirely different public interest considerations would be involved if SCC were to apply for such a waiver, and that it is therefore absurd to claim, as petitioners do, that no new issues would be raised by a waiver application filed by SCC.³⁹ In addition, KKTv states that petitioners are wrong in claiming that the Commission must consider only technical issues in granting minimum spacing waivers, and in claiming that a grant of the waiver in question here to SCC would be required by the doctrine of *res judicata*. With respect to the latter claim, KKTv argues that the doctrine of *res judicata* would not be applicable to a waiver request by SCC because, *inter alia*, SCC was not a party to the USC waiver request proceeding.⁴⁰ Finally, KKTv argues that the Commission's consideration of the nature of a station's programming as a public interest factor in minimum spacing waiver decisions is not unconstitutional, and asserts that USC, which specifically argued that it should receive its requested waiver because it provides educational programming, should not now complain that the consideration of this factor is unconstitutional.⁴¹

19. Pikes Peak, in its comments, also agrees with our determination in the *Notice* that the Cheyenne Mountain construction permit should not be included in a channel exchange between USC and SCC. According to Pikes Peak, the Commission's grant of the minimum spacing waiver to USC was based on Station KTSC(TV)'s status as a noncommercial educational facility, and the short-spacing rules would be circumvented if SCC were allowed to obtain the permit.⁴² In Pikes Peak's view, the exchange proposal would "destroy the expanded noncommercial coverage" that was the basis for granting USC the Cheyenne Mountain permit, and replace it with "minimally improved coverage from secondary, displaceable facilities."⁴³ In its reply comments, Pikes Peak reiterates its view that the proposed exchange is not in the public interest because the objective of the Commission's channel exchange policy is to improve noncommercial coverage and USC can improve its coverage only by operating at Cheyenne Mountain.⁴⁴ Pikes Peak further asserts that there is nothing in the FCC's exchange policy order or any other authority cited by petitioners that obligates the Commission to include a short-spaced construction permit site in a channel

³¹ *Id.* at 6-8.

³² Joint Reply Comments at 11-14. Petitioners cite, *inter alia*, *Gary, Indiana*, MM Docket No. 86-80, 51 Fed. Reg. 30,864 (1986), *petition for recon. dismissed*, 1 FCC Rcd 975 (1986), *Clermont and Cocoa, Florida*, 4 FCC Rcd 8320 (M.M.B. 1989), and *Boca Raton and Lake Worth, Florida*, 8 FCC Rcd 6189 (M.M.B. 1993) -- cases in which the Commission approved channel exchanges involving construction permits for unbuilt facilities -- in support of their assertion that we are bound by precedent to include the Cheyenne Mountain construction permit in the channel exchange at issue here.

³³ Joint Comments at 5-6 n.7. As already noted, petitioners in fact have filed an application for FCC consent to the assignment of the permit from USC to SCC. This application was

filed on September 2, 1993, one day before the deadline for filing comments in the instant proceeding. See *supra* note 17.

³⁴ Joint Comments at 5 n.7.

³⁵ *Id.* at 14-17. However, petitioners cite no case law in support of this contention.

³⁶ Joint Comments at 3 n.3; Joint Reply Comments at 4-5.

³⁷ KKTv Comments at 11-21.b

³⁸ KKTv Reply Comments at 2-5.

³⁹ *Id.* at 5-6.

⁴⁰ *Id.* at 12-15.

⁴¹ *Id.* at 16-17.

⁴² Pikes Peak Comments at 2-3.

⁴³ *Id.* at 9.

⁴⁴ Pikes Peak Reply Comments at 2-3.

exchange.⁴⁵ In its comments, Pikes Peak concludes that petitioners' channel exchange proposal should be denied but does not oppose the proposal as set forth in the *Notice*. In its reply comments, Pikes Peak requests that the Commission dismiss the *Notice* in its entirety, based on petitioners' statement that they will not pursue the exchange as proposed therein, or grant the exchange only as proposed in the *Notice*.⁴⁶

20. CWC expresses no opinion as to the merits of the channel exchange proposed in the *Notice* but opposes SCC's request that it be authorized to operate from the Cheyenne Mountain construction permit site, which, according to CWC, is short-spaced to both the Laramie reference coordinates and CWC's proposed transmitter site. CWC states that its proposed station would provide the first over-the-air noncommercial television service to a substantial portion of southeastern Wyoming, including the state capital, Cheyenne.⁴⁷

21. *Discussion.* Petitioners are correct in stating that the intraband channel exchange procedures of Section 1.420(h) of the Commission's Rules are available to permittees. However, we do not agree with petitioners' assertion that, merely because a permittee of an unbuilt station could be a party to a channel exchange, it therefore follows that a construction permit for the modification of licensed facilities "must" be transferred in connection with a channel exchange proposal.⁴⁸ Nothing in Section 1.420(h) or the Commission's policies underlying that rule requires the transfer of a construction permit held by a licensee for the modification of its facilities as part of a channel exchange. Moreover, petitioners make far too much of the fact that the Commission recognized when it adopted Section 1.420(h) that intraband channel exchanges could result in benefits for both noncommercial and commercial stations. This recognition does not mean, as petitioners suggest, that the Commission intended in adopting its channel exchange procedures to ensure a benefit for commercial stations.⁴⁹ Indeed, the Commission clearly stated when it adopted Section 1.420(h) that its primary purpose in doing so was

to enable noncommercial educational stations to improve their service.⁵⁰ In upholding the channel exchange policy, the U.S. Court of Appeals for the District of Columbia Circuit also explained that the Commission adopted the policy "as a rescue effort for educational broadcasting in the wake of decreases in federal funding" and repeatedly referred in its opinion to the FCC's goal of promoting educational television by making it easier for educational channels to raise money through channel exchanges.⁵¹ We assume that commercial stations will request channel exchanges with noncommercial stations when it is in their interest to do so, but Commission policy in no way requires that the commercial party to a channel exchange receive any particular benefit in order for the exchange to be in the public interest.⁵²

22. Petitioners' contention that Commission precedent requires inclusion of the Cheyenne Mountain construction permit in the channel exchange proposal under consideration is also wrong. Petitioners cite cases in which the Commission has approved exchanges that benefited commercial stations, suggesting that these cases somehow support the proposition that SCC is entitled to the benefit it seeks through the exchange. However, the case law does not support such a proposition. Moreover, petitioners' claim that the benefit SCC seeks is no different from the benefits obtained by other commercial stations whose channel exchange proposals have been approved is also inaccurate. As petitioners correctly state, the Commission has approved channel exchanges involving construction permits for unbuilt stations, allowing commercial stations to relocate their transmitters to construction permit sites. However, Commission case law does not require us to approve a channel exchange that would result in a commercial station moving to a site at which it would be short-spaced.⁵³

23. Moreover, the grant of a minimum spacing waiver in connection with petitioners' request to amend the TV Table of Allotments would be inconsistent with well-established Commission policy.⁵⁴ The Commission has denied

⁴⁵ *Id.* at 7-8.

⁴⁶ *Id.* at 1-2, 10.

⁴⁷ CWC Comments at 1-2.

⁴⁸ See Joint Comments at 4-5.

⁴⁹ See Joint Reply Comments at 10.

⁵⁰ See *Intraband Television Channel Exchanges*, 59 RR 2d at 1464a.

⁵¹ *Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405, 406, 409, 410 (D.C. Cir. 1991). The Commission's interest in assisting noncommercial educational stations in particular through its channel exchange procedures is reflected in Section 1.420(h) itself, which does not apply to exchanges between two commercial stations, but only to exchanges to which a noncommercial station is a party, and in various aspects of the Commission's order adopting Section 1.420(h). Thus, for example, the Commission explained in adopting the rule that it would apply Section 1.420(h) to permittees in order to help noncommercial permittees build their stations and that it would accord significant weight to determinations made by directors of public stations in assessing the public interest benefits of a proposal. *Intraband Television Channel Exchanges*, 59 RR 2d at 1464a.

⁵² We note that in upholding the Commission's decision to approve a channel exchange in *Clermont and Cocoa, Florida*, 4 FCC Rcd 8320 (M.M.B. 1989), *aff'd*, 5 FCC Rcd 6566 (1990), the Court of Appeals concluded that the FCC properly determined that the exchange served the public interest and further explained that the money obtained by the noncommercial station "allows an educational channel to operate where it otherwise

would not have. Cash infusion is stated in the Policy to be one way to promote the public interest, and the Policy does not require that exchanges promote the public interest in more than one way." *Rainbow Broadcasting*, 949 F.2d at 413.

⁵³ Petitioners assert pointedly that the Commission has approved exchanges that allowed commercial stations to move their transmitters to sites where they would have been prohibited from moving by the Commission's minimum distance separation requirements if they had continued to broadcast on the channel originally assigned to them. Contrary to the conclusion petitioners draw, the approval of such an exchange would in no way support our approval of an exchange resulting in a move to a short-spaced site.

⁵⁴ Petitioners assert that in the *Notice* the Commission excluded the Cheyenne Mountain permit from its channel exchange proposal solely because USC had not implemented the permit, without mentioning the minimum distance separation rules. Joint Reply Comments at 13 n.32. This characterization of the *Notice* is inaccurate. In making its proposal based on the coordinates of USC's and SCC's licensed facilities at Baculite Mesa, the Commission specifically noted that SCC can operate Station KOAA-TV on Channel 8 at USC's licensed site in conformity with the minimum distance separation rules, whereas the allotment of Channel 8 at Cheyenne Mountain would be short-spaced, and the Commission further stated that it was not appropriate to consider a short-spacing request at the rule making stage. *Notice*, 8 FCC Rcd at 4753.

the vast majority of requests for short-spaced allotments because it has "a strong interest in preserving the integrity of the Table of Allotments and the mileage separation criteria upon which the Table is based."⁵⁵ As the Commission has explained, "[s]trict adherence to the spacing requirements reflected in the Table is 'necessary . . . in order to provide a consistent, reliable and efficient scheme of [allotments].'"⁵⁶ In the rare cases in which the Commission has granted short-spaced allotments, it did so based on highly unusual circumstances. Thus, in the *VHF Drop-In Proceeding*, the Commission granted four requests for short-spaced allotments that resulted in service gains of more than 500,000 persons with minimal service interference or loss.⁵⁷ The Commission explained at the time that short-spaced allotments would be permitted only where there was a large public benefit to be gained at minimal cost.⁵⁸ We have continued since then to apply this principle, requiring that the public interest benefits of the short-spaced allotment be large enough to outweigh the public interest benefit of the minimum spacing rules.⁵⁹ In applying this policy, the Commission has also explained: "Absent a demonstration of compelling need for departure from established interstation separation standards, the Commission will not grant a waiver of the minimum spacing rules for allotment purposes."⁶⁰

24. In the instant proceeding, petitioners have not made a showing of compelling need to support their request for a short-spaced allotment, nor are we dealing here with an extraordinary situation. This is an ordinary case in which petitioners understandably seek to improve their coverage of certain geographical areas, but the public interest benefits that would be derived from the short-spaced allotment they seek are not large enough to outweigh the public interest benefit of the integrity of the TV Table of Allotments and the minimum spacing rules. As we have already indicated, most of the noncommercial service gains to be derived from the channel exchange proposal would be achieved through translators, which may be displaced by full power stations. Thus, such gains might have to be forfeited at any time, and it would be inappropriate for us to consider them here. Moreover, even if it were appropriate for us to consider Station KTSC(TV)'s projected gains in secondary service in our assessment of the public interest benefits of the proposed channel exchange, USC has already applied for construction permits for translators at Grand Junction and Durango. It appears, therefore, that USC plans to expand its service to the Western Slope of Colorado by means of these translators whether or not the proposed channel exchange is approved, and the exchange is not needed to accomplish this expansion. If the exchange were approved, only 5,398 persons would gain a new noncommercial service that is not attributable to translators.

25. Opponents of petitioners' proposed channel exchange also argue that the exchange would not be in the public interest for other reasons. According to KKTU, for example, 29,367 people would lose their only off-air primary commercial service as a result of the exchange if SCC were permitted to operate Station KOAA-TV from Cheyenne Mountain, while only 2,906 viewers would receive their first, off-air primary noncommercial service from Station KTSC(TV). Arguing that any loss of service is *prima facie* inconsistent with the public interest, KKTU contends that the large losses involved here are contrary to the public interest.⁶¹ KKTU also states that any improvements in noncommercial service as a result of the translator service proposed by petitioners would be marginal, in part because many of the people the translators would reach already receive educational television through cable.⁶² Petitioners, on the other hand, assert that any loss of commercial service caused by their proposed exchange would be *de minimis* and would be outweighed by the noncommercial service gains to be realized.⁶³

26. We find that it is unnecessary to resolve all of the various points in dispute between petitioners and other commenters as to how the potential losses and gains in service should be evaluated in this case. It is apparent that USC has decided to go forward with its translator expansion on the Western Slope independently of the proposed channel exchange. Moreover, even if we were to consider as part of our public interest analysis the translator stations petitioners claim USC would build or acquire as a result of their proposed exchange — i.e., stations at Colorado Springs, Durango, and Grand Junction —, we would be forced to recognize that these stations could provide only secondary service. In light of this fact, and given the very small number of people that would gain a new noncommercial service that is not attributable to translators, we conclude that the public benefits to be gained by including the Cheyenne Mountain construction permit in the proposed channel exchange fall far short of the large benefits the Commission has required in order to grant a short-spaced allotment.

27. Petitioners have stated that SCC's continued interest in the proposed channel exchange is conditioned upon inclusion of the Cheyenne Mountain construction permit in the exchange proposal ultimately approved by the Commission. As explained above, however, we find that inclusion of the Cheyenne Mountain construction permit would not be in the public interest. Accordingly, the channel exchange proposal presented in the *Notice* will not be modified to include this permit. In light of petitioners' lack of interest in pursuing the proposal as set forth in the *Notice*, there is no need to consider further whether this proposal would be in the public interest.

⁵⁵ *Chester and Wedgefield, South Carolina*, 5 FCC Rcd 5572, 5572 (1990).

⁵⁶ *Id.* (citing *Millington, Maryland*, 45 RR 2d 1689, 1690-91 (1979)).

⁵⁷ *Petition for Rulemaking to Amend Television Table of Assignments to Add New VHF Stations in the Top 100 Markets and to Assure That the New Stations Maximize Diversity of Ownership, Control and Programming, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 63 F.C.C.2d 840 (1977), *Report and Order*, 81 F.C.C.2d 233, 261-67 (1980), *recon. denied*, 90 F.C.C.2d 160 (1982).

⁵⁸ 63 F.C.C.2d at 855.

⁵⁹ See, e.g., *London, Kentucky*, 7 FCC Rcd 5936, 5937 (M.M.B. 1992).

⁶⁰ *Id.* See also *Portland, Tennessee*, 35 F.C.C.2d 601, 602 (1972) (explaining that minimum spacing waiver at rule making stage could only be considered in an "extraordinary situation"); *Toms River, New Jersey*, 43 F.C.C.2d 414, 417-18 (1973) (finding that absent "special justification," there is no public interest basis for proposing short-spaced allotment).

⁶¹ KKTU Reply Comments at 18-19.

⁶² KKTU Comments at 8-10.

⁶³ Joint Reply Comments at 14-20.

28. Accordingly, IT IS ORDERED, That the Joint Motion to Consolidate Proceedings filed by the University of Southern Colorado and Sangre De Cristo Communications, Inc., IS DENIED.

29. IT IS FURTHER ORDERED, That the petition for rule making to exchange channels filed by the University of Southern Colorado and Sangre De Cristo Communications, Inc., IS DENIED.

30. For further information concerning this proceeding, contact Diane Conley, Mass Media Bureau, (202) 776-1653.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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SEP - 8 1992

Federal Communications Commission
Office of the Secretary

In the Matter of

Amendment of § 73.606
Table of Amendments,
Television Broadcast Stations
(Pueblo, Colorado)

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PETITION FOR ISSUANCE OF NOTICE OF
PROPOSED RULEMAKING TO EXCHANGE CHANNELS

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Counsel for Sangre de Cristo
Communications, Inc.

September 8, 1992

In the Matter of
Amendment of § 73.606
Table of Amendments,
Television Broadcast Stations
(Pueblo, Colorado)

**PETITION FOR ISSUANCE OF NOTICE OF
PROPOSED RULEMAKING TO EXCHANGE CHANNELS**

The University of Southern Colorado, permittee of noncommercial Television Station KTSC-TV, Channel 8, Pueblo, Colorado (hereinafter the "University") and Sangre de Cristo Communications, Inc., licensee of Television Station KOAA-TV, Channel 5, Pueblo, Colorado (hereinafter "SCC") (collectively the "Petitioners"), petition the Commission to: (1) issue a Notice of Proposed Rulemaking providing for an amendment to the Television Table of Allotments so that Channel 8, Pueblo, Colorado is designated as a commercial channel and commercial Channel 5, Pueblo, Colorado is designated as a noncommercial channel pursuant to Section 1.420(h) of the Commission's Rules; and (2) modify the license of KTSC-TV to specify operation on Channel 5*; and (3) modify the license of KOAA-TV to specify operation on Channel 8 in accord with an existing

construction permit held by the University. (FCC File No. BPET900122KE).

PRELIMINARY STATEMENT

1. The University is committed to providing culturally diverse programming of superior quality through its noncommercial, educational television service. As a result, the University has distinguished itself by providing more weekly local programming (other than local news) than any other broadcast station in the market. In addition, the University has established a network of television translator stations to expand its public television service to communities which are either unserved or located in geographically-isolated areas. By its ownership and operation of eleven television translator stations, the University is the leading provider of public broadcasting service to remote and unserved areas in its Southern Colorado. Despite the University's numerous translators stations, there still remain some areas which only receive public broadcasting service via satellite. As will be seen below, the proposed exchange of Channel 8 and Channel 5 would permit the University to enhance the quality of KTSC-TV's signal, to expand its current translator network and to offer additional public broadcast service programs. See affidavit of Gregory Sinn, attached hereto as Exhibit 1 (the "Sinn Affidavit"), p. 2.

2. SCC has consistently endeavored to expand and improve its services to better serve Pueblo, its community of license, and the surrounding areas including the city of Colorado Springs and El Paso

county. However, due to the Commission's mileage separation rules, SCC has been unable to move KOAA-TV to the antenna site used by the other commercial stations in the joint market, Colorado Springs - Pueblo.

Through the exchange of channels proposed herein, SCC will be able to realize its goal of increased service to the entire market. At the same time, the channel exchange will substantially advance the interests of the University in upgrading the facilities of its full-service noncommercial television station and enhance its programming.

3. In accordance with the provisions of Section 1.420(h) of the Commission's Rules, the parties propose the following change in the TV Table of Allotments (47 C.F.R. § 73.606 (b)):

	<u>Present</u>	<u>Proposed</u>
Pueblo, Colorado	5, *8, 26+, 32-	*5, 8, 26+, 32-

The proposed channel exchange does not involve any other changes in the allotment table. It is a straight-forward swap whereby the University will operate noncommercially on Channel 5 and SCC will operate commercially on Channel 8. As set forth in more detail below, SCC has agreed to provide substantial benefits to the University in exchange for its participation in the channel exchange. These benefits support the conclusion that the public interest will be served by grant of this petition.

**THE PROPOSED CHANNEL EXCHANGE IS IN
THE PUBLIC INTEREST**

4. The proposal will permit the University to improve the quality of its noncommercial, educational television service in furtherance of its public broadcasting mission. This will be accomplished through the substantial monetary and other benefits the University has received and will receive from SCC upon approval of the channel exchange.

5. As an important result of the channel exchange, SCC has agreed to provide financial assistance to the University in the amount of \$1,000,000. The University plans to use approximately \$150,000 of that amount to expand the University's network of translators to the Western Slope of Colorado. See Sinn Affidavit, p. 2. At present, residents of the Western Slope receive public television service only via satellite delivery. Based on its public broadcast service efforts, the County Commissioners of Ouray, Delta and Montrose counties have selected KTSC-TV to be the noncommercial, educational television station to serve the Western Slope. The University intends to provide service to those countries and others on the Western Slope through use of translator and microwave stations. A portion of SCC's monetary contribution will be used to finance the construction of these translator and microwave stations. Petitioners are prepared to submit letters and other statements from various federal, state and local officials commenting on the University's plans to expand its service. Through this planned expansion of the University's translator network, KTSC-TV will obtain approximately 83,000 new viewers who have

never had public broadcasting service in the past. See Engineering Statement of Cohen and Dippell, Exhibit 2.

6. The remainder of SCC's monetary contribution will be placed in an endowment fund. The income earned from such fund will be used exclusively to broaden and expand the programming offered by the University on KTSC-TV. Sinn Affidavit at p. 3. The University currently offers the entire Public Broadcasting Service roster of programming. The University is committed to providing a public forum in which local issues can be addressed. Consequently, KTSC-TV's programming has been aimed at discussing and examining those topics which are important to the residents of southern and western Colorado. The University intends to use some of the funds obtained in connection with the proposed channel exchange to expand KTSC-TV's schedule by including several programs which have been requested by viewers and some programs focusing on the smaller communities which usually get limited, if any, television exposure.

7. Petitioners submit that the benefits to educational broadcasting offered by this proposal clearly support a finding that the public interest will be served. The channel swap proposed herein will permit the University to provide new service to 299,897 persons within either the proposed Grade B service contours of KTSC-TV or within the service area of new translators.

8. Grant of the petition will permit the University to increase the range of its service. Upon approval of the channel exchange, the

University and SCC have agreed to exchange certain transmission equipment which is currently used in the operation of KTSC-TV and KOAA-TV. As part of this equipment exchange, the University will receive a dual thirty kilowatt cross polarized transmitter (with a total capacity of sixty kilowatts) to replace its present single 30 kilowatt transmitter. This dual transmitter will permit a stronger and better quality signal over Pueblo and the entire Colorado Springs - Pueblo market. Furthermore, the dual transmitter is more reliable than KTSC-TV's present transmitter. See Sinn Affidavit, p. 1.

9. In addition, SCC has agreed to subject to FCC approval, assign the license for its television translator station which is currently operating on Channel 30 from Cheyenne Mountain . This translator will allow the University to cover a wider area of El Paso county than it currently services.

10. The foregoing proposal is in the public interest because it will advance the goals established by the Commission in Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations, 59 Rad. Reg. 2d (P&F) 1455 (1986), recon. denied, 3 FCC Rcd 2517 (1988).

[T]he goal of speeding development of educational television service favored by the Commission in that earlier rule making proceeding is, likewise, favored here where, as noted, the Commission believes that implementation of the proposed rule could speed the introduction of noncommercial educational television service or expedite enhanced service to certain communities.

Id. at 1462. Consistent with the Commission's conclusions in authorizing channel exchanges, the benefits to the University and the public are directly tied to the noncommercial programming to be provided by the University. Both the technical facilities and programming broadcast by the University will be enhanced by this proposal.

11. The exchange agreed to herein between SCC and the University compares favorably to the exchange approved between Channels 18 and 68 in Clermont and Cocoa, Florida. Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations, 4 FCC Red 8320 (1989), recon. denied, 5 FCC Red 6566 (1990), aff'd, 69 Rad. Reg. 2d (P&F) 1572. In that case the direct benefit to the noncommercial petitioner was a total monetary contribution of \$1,240,000.00 and title to certain equipment currently used in the operation of the noncommercial station which was being used by the noncommercial petitioner without charge. The Commission's decision in Clermont and Cocoa also relied upon the improved service that would be provided by the commercial facility by grant of the requested channel exchange.

CONCLUSION

In adopting Section 1420(h) of its Rules and Regulations in 1986, the Commission stated: "Intraband exchanges are desirable because such exchanges may benefit both stations involved with consequent advantages

to the public."^{1/} Petitioners submit that they have presented substantial evidence of how their proposal benefits the public. Therefore, they respectfully petition the Commission to issue a Notice of Proposed Rulemaking proposing the exchange of Petitioners' channels.

Respectfully submitted,

UNIVERSITY OF SOUTHERN
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September 8, 1992

^{1/} Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations, supra, at 1461.

EXHIBIT 1

Affidvair of Gregory Sinn

AFFIDAVIT OF GREGORY SINN

I, Gregory B. Sinn am general manager of Television Station KTSC-TV, I have served in that capacity for seven years.

The proposed rulemaking concerning an asset exchange between KOAA-TV (Channel 5) and KTSC-TV (Channel 8) will be of substantial short and long term benefit to KTSC-TV and the people of southern and western Colorado.

One significant and immediate benefit of the channel exchange is the exchange of KTSC-TV's current single 30 kw transmitter for a dual 30 kw (60 kw total) circular polarized transmitter currently used by KOAA-TV. This provides for an enhanced and stronger signal to our city of license. It also gives twice the reliability that two transmitters enable versus the single transmitter KTSC-TV now operates.

KTSC-TV is the leader in Colorado for providing a PBS service to unserved communities. KTSC-TV owns and operates more translators to reach isolated viewing areas than any other broadcast station in the state, with a total of 11. KTSC-TV has a long range plan to provide translators to unserved communities in an effort to expand public television service to remote or unserved communities. The following list shows the communities KTSC-TV has placed translators in and the year they were activated:

<u>Site</u>	<u>Year</u>
Colorado Springs	1977
Manitou Springs	1977
Aguilar	1980
Alamosa	1980
Del Norte	1980
La Veta	1980
Salida	1980
San Luis	1980
Trinidad	1980
Coaldale	1986
Cotopaxi	1986
Montrose	1992

Unfortunately, there are still areas of Colorado that do not receive PBS except via satellite delivery. These regions are on the Western Slope of the state and encompass approximately 208,000 people including the population centers of Grand Junction and Durango. The inclusion of these communities would provide a significant increase in new KTSC-TV viewers:

<u>Colorado Counties on Western Slope</u>	<u>1990 Census - Persons</u>	<u>Population Served with New Translators</u>
Mesa	93,145	65,995
Delta	20,980	
Montrose	24,423	
Ouray	2,295	
San Miguel	3,653	
Dolores	1,504	
San Juan	745	
La Plata	32,284	16,876
Montezuma	18,672	
Gunnison	10,273	
Total	207,974	82,871

KOAA-TV will provide KTSC-TV with \$1 million dollars. Their funds will enable KTSC-TV to fulfill its role in expanding its service to these communities. Using only 15% of the \$1 million endowment, we will further our primary mission of providing a high quality culturally diverse and free public television service to all the citizenry of our country. We plan to use \$150,000 for the following expansion of our translator system:

Service Expansion Costs		
Microwave	- Montrose to Grand Junction	\$25,000
Translator	- Grand Junction	\$25,000
Microwave	- Montrose to Ouray	\$25,000
Microwave	- Ouray to Molas Divide	\$25,000
Microwave	- Molas Divide to La Plata	\$25,000
Translator	- Durango	<u>\$25,000</u>
Total		\$150,000